No. 83-625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES D. GRIFFIN, etc., et al.,
Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, NEW YORK, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR CITY OF ST. LOUIS, MISSOURI, AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the inherent limitations on the equitable powers of the federal courts preclude orders mandating state and local governments to provide substantial sums of public money to a board of education for the purpose of funding educational programs in the context of desegregation remedial decrees, in the absence of findings by the district court, supported by clear and convincing evidence, that the programs in question will in fact remedy the specific condition offending the constitution or an identifiable effect of the constitutionally offensive condition?

2. Whether a district court can direct appropriation of substantial additional funds by a local government for use by a school board purportedly to carry out a school desegregation decree, primarily on the basis of the "good faith" of school authorities?

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BRIEF FOR CITY OF ST. LOUIS, MISSOURI, AMICUS CURIAE IN SUPPORT OF PETITIONERS

This brief is presented for the City of St. Louis, a political subdivision of the State of Missouri, and is sponsored by the authorized law officer of the City of St. Louis. The brief is filed pursuant to Supreme Court Rule 36.4. The petition for writ of certiorari supported by the City as amicus curiae was docketed on October 12, 1983, and this brief is filed within the time allowed for filing a brief in opposition to the petition.

INTEREST OF AMICUS

The City of St. Louis ("amicus City") is a plaintiff-intervenor in an interdistrict school desegregation case now pending in the United States District Court for the Eastern District of

Missouri, *Liddell* v. *Board of Education of the City of St. Louis*. As a county and as a constitutional charter city under the law of Missouri, amicus City and its officers are responsible for preparing and distributing tax bills, and collecting property tax bills within city boundaries, including property taxes levied independently by the Board of Education of the City of St. Louis, an autonomous political subdivision. Amicus City and its officers also defend against tax protest suits filed under the law of Missouri.

On July 5, 1983, the district court entered a judgment and order approving a settlement agreement purporting to resolve the interdistrict school desegregation claims in *Liddell* v. *Board of Education*, see 567 F.Supp. 1037 (E.D.Mo. 1983). The agreement was conditional upon entry of an order by the district court which established adequate funding for the obligations of the parties. The formula prescribed in the settlement shall be paid by a combination of State funding and a tax rate increase in the City of St. Louis.[1] *Id.*, 1052. The State of Missouri did not consent to the settlement; under Missouri law, the Board of Education of the City of St. Louis lacked authority to enter into district court. *In re City of St. Louis, et al.*, No. 83-2140, 8th Cir. See Appendix (vi) to petition for writ of certiorari, p. 96a. Partly in response to amicus City's petition for prohibition, the Court of Appeals has stayed further action by the district court in respect to property taxes. *Id.*, 105a. Argument of various appeals and the petition for prohibition is set before the Court of Appeals en banc on November 28, 1983.

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[1] Cost estimates for the first year of the settlement ranged from $37,000,000 to $87,000,000. 567 F.Supp. 1051. Evidence presented to the district indicated that aggregate cost over five years would be nearly $1,000,000,000. However, the district court entered its orders affecting property tax rates and compelling massive State funding without entering any findings concerning the cost of the settlement agreement, or the relationship between the terms of the settlement and any existing constitutional violations.

In addition to its direct involvement in the *Liddell* litigation described above, amicus City is frequently itself the target of remedial decrees fashioned by federal courts for constitutional violations, or of actions seeking such relief. Consequently, amicus City is vitally concerned with the scope of federal judicial intrusion into taxation and spending by state and local governments.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE IT RAISES SERIOUS QUESTIONS OF NATIONAL IMPORTANCE INVOLVING THE STANDARDS WHEREBY FEDERAL DISTRICT COURTS FASHION AND IMPLEMENT REMEDIES FOR CONSTITUTIONAL WRONGS, INVOLVING CONTINUAL FEDERAL JUDICIAL INTRUSION INTO THE FISCAL AFFAIRS OF STATE AND LOCAL GOVERNMENTS TO DIRECT THE RAISING OR EXPENDITURE OF SUBSTANTIAL SUMS OF PUBLIC MONEY.

The instant case represents one of the latest episodes in a developing story of the exercise of the power of the purse by the federal judiciary. See generally Frug, *The Judicial Power of the Purse,* 126 U.Pa.L.Rev. 715 (1978); Eisenberg & Yeazell, *The Ordinary and Extraordinary in Institutional Litigation,* 93 Harv.L.Rev. 465 (1980); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies,* 30 Stan.L.Rev. 661 (1978); Comment, *Enforcement of Judicial Financing Orders,* 59 Geo.L.J. 393 (1970). This Court has frequently addressed the essential predicate for exercise of the equitable powers of federal courts in fashioning remedies for constitutional violations. E.g., *Dayton Board of Education* v. *Brinkman I,* 433 U.S. 406 (1977); *Milliken* v. *Bradley II,* 433 U.S. 267 (1977); *Hills* v. *Gautreaux,* 425 U.S. 284 (1976); *Milliken* v. *Bradley I,* 418 U.S. 717 (1974); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). However, to date this Court has

not expounded precise standards governing when and how the equitable powers of the federal courts can be employed to provide additional public money at the behest of constitutional violators for the purpose of effectuating remedial decrees. In particular, this Court has not yet laid down controlling standards concerning burden of proof, degree of deference to state and local authorities when those authorities are in disagreement, and the permissible degree of intrusion by federal courts into the appropriations and taxing process of state and local governments in order to increase public funds available for remedial decrees. Amicus City submits that the time to do so has long since come, and that the instant case presents an opportunity to address these serious and important national questions.

Cases in which federal courts have decreed remedies for constitutional violations by state and local governments are legion, and involve massive changes in schools, prisons, public hospitals, and other local public institutions. See Frug, *supra*. Increasingly, these remedial decrees entail more than the restructuring of existing programs or operations, or the reallocation of existing resources to ensure that all are equally treated; rather, they entail the creation of vast new programs, necessitating the expenditure of large sums of public money, invariably thought by the local bureaucracy involved to be well beyond the existing means of the violator. Consequently, the demands upon federal courts to supervise the allocation or reallocation of scarce resources among competing governmental entities, or departments within governmental entities, are also increasing. Given the trend of continual expansion of the concept of remedies and wrongs in "institutional litigation" in federal courts, there is little likelihood that federal judicial activity in this realm will diminish in the foreseeable future. Moreover, as was astutely observed to the court of appeals at oral argument, local bureaucracies have been alert to manipulate the federal judicial process to gain what could not be achieved through the political process, under the guise of implementing a federal remedial decree. See petition for certiorari,

appendix (i), 8a. This bureaucratic opportunism represents a serious threat to the continued viability of state and local fiscal procedures, and calls for prompt attention by this Court in devising standards which will carefully restrict federal judicial intrusion into this sensitive area. Cf. *San Antonio Reorganized School Dist.* v. *Rodriquez,* 411 U.S. 1 (1973).

In the instant case, it is evident that the district court, affirmed by the court of appeals, misallocated and misperceived the burden of proof on the issue before it, and wholly failed to provide appropriate findings to warrant the overruling of the budgeting judgments made by petitioners. Both the opinions of the district court and the court of appeals make clear that the good faith of the educational authorities involved was crucial to their determination that petitioners could be required to allocate more money to the Buffalo public school system. Moreover, it is clear that the district court was animated by concern for the funding of programs in the Buffalo public schools which were unrelated to its desegregation decrees. Finally, neither the district court nor the court of appeals appears to have required a demonstration that particular programs for which funds were demanded by the Buffalo public school authorities (respondents here) were in fact related to an identifiable condition offending the constitution, or an identifiable effect of a demonstrated unconstitutional condition.

This Court has repeatedly emphasized that the fashioning of remedial decrees is the task of the district courts in the first instance, and that, in functioning to remedy unconstitutional conditions, adequate findings of fact, in conformity with Rule 52, F.R.Civ.P., are crucial. See, e.g., *Dayton Board of Education* v. *Brinkman I, supra;* cf. *International Salt Co.* v. *United States,* 332 U.S. 392 (1947). Careful factual inquiry, followed by careful tailoring of remedies to violations, is especially critical when a district court is asked to exercise the power of the purse—a power which many would deny to the judiciary. Cf. *The Federalist,* No. 47, p. 324 (Cooke ed. 1961). In this case,

the court of appeals recognized that the district court's memorandum fell short of the requirements of Rule 52 and provided an inadequate basis for the exercise of remedial power. See petition for certiorari, appendix (i), 10a-11a. Nevertheless, the court of appeals affirmed, actuated by deference to "the good faith representations of the school authorities." *Id.*, 10a. Surely this was error.

In cases such as these, it is urgent that the burden be placed upon the plaintiffs, or the governmental entity seeking additional funds, to show by clear and convincing evidence, first, that the need for additional funds is directly related to the curing of a constitutionally offensive condition, cf. *Milliken* v. *Bradley II, supra,* 433 U.S. 286 n. 17; second, that the resources available to the applicant are inadequate to implement the remedy proposed, without regard to other demands placed upon the applicant by conditions unrelated to the constitutional violation; and, third, that no other reasonable alternative to judicial action exists. Cf. *Evans* v. *Buchanan,* 447 F.Supp. 982 (D.Del.1978), rev'd in part, 582 F.2d 750 (3d Cir. 1978), cert. denied sub nom. *Delaware State Bd. of Education* v. *Evans,* 446 U.S. 923 (1980), on remand, 468 F.Supp. 944 (D.Del. 1979); *Plaquemines Parish School Bd.* v. *United States,* 415 F.2d 817 (5th Cir. 1969). The good faith of the educational authorities in devising the plan or program for which additional funds are sought is, and ought to be, utterly irrelevant when they are the ones demanding judicial intrusion into fiscal affairs. Cf. *Morgan* v. *McDonough,* 689 F.2d 265, 280 (1st Cir. 1982). The deference of federal courts to state and local authorities in devising remedies certainly must be tempered when those authorities are in disagreement among themselves.

Neither the courts nor educational authorities should feel free to ignore fiscal reality in seeking to remedy constitutional violations. Although lack of funds does not excuse compliance with the constitution, the duty to remedy constitutional violations should not carry with it carte blanche on the fisc. Cf. *Pennhurst*

State School & Hospital v. *Halderman*, 101 S.Ct. 1531, 1545-46 (1981). If there is any truth to the oft-repeated dictum that the federal courts do not sit as super-legislatures, see *San Antonio Independent School Dist.* v. *Rodriquez, supra*, it would seem that financial disputes between governmental entities or agencies should not ordinarily be resolved in federal district courts. If sufficient funds are not available to operate a school district free from discrimination, it would seem that the role of the federal court should be limited to enjoining continuation of operation of the school district unless funds are provided or can be raised to operate in conformity to the constitution. Cf. *Palmer* v. *Thompson*, 403 U.S. 217 (1971).

Of course, amicus City recognizes important differences between this case and *Liddell* v. *Board of Education*, 567 F.Supp. 1037 (E.D.Mo. 1983), appeals and petition for writ of prohibition pending. However, there is a very significant similarity between the approaches taken by the district courts in both cases.[2] Neither troubled itself to make adequate findings of fact to demonstrate that the expenditures decreed by it were related to a condition offending the constitution.[3] See *Oliver* v. *Kalamazoo Bd. of Ed.*, 640 F.2d 782 (6th Cir. 1980). An unwarranted

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[2] Of course, the existence of a conflict between the decision of the Court of Appeals for the Second Circuit in this case and the likely decision of the Court of Appeals for the Eighth Circuit in *Liddell* remains speculative at this time. Amicus City fervently hopes that the latter court will reverse the order of the district court in *Liddell*. Nevertheless, the pendency of *Liddell* lends additional impetus to the need for certiorari in the instant case. Absent explication of stringent standards controlling the district courts in seeking to exercise the power of the purse, unconscionable intrusions into state and local appropriations processes and even taxation can be expected to multiply.

[3] Amicus City also recognizes that petitioners, or at least the common council of the city of Buffalo, were found liable for contributing to illegal segregation of the Buffalo public schools. *Arthur* v. *Nyquist*, 415 F.Supp. 904, 429 F.Supp. 206 (W.D.N.Y. 1976-77), aff'd in part and rev'd in part, 573 F.2d 134 (2d Cir.), cert. denied, 439 U.S. 860

assumption is made by both courts that once a violation is found, any program designed to improve educational quality is a permissible part of the remedy and any funds needed for the remedy must be "new" funds, i.e., additional funds above and beyond existing revenues or appropriations. Such approaches to judicial exercise of the power of the purse cannot be countenanced, lest the federal district courts become the ultimate and perpetual arbiters of the budgets of state and local governments. Only this Court can administer the necessary antidote by reviewing and reversing the court of appeals in this case.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS, REGARDING THE MANNER AND MEANS OF FEDERAL JUDICIAL INTRUSION INTO THE FISCAL AFFAIRS OF STATE AND LOCAL GOVERNMENTS IN THE CONTEXT OF FASHIONING AND IMPLEMENTING REMEDIAL DECREES.

The conflict between the approach taken by the court of appeals in this case, and the approach mandated by this Court in *Milliken* v. *Bradley II, supra,* and *Dayton Board of Education* v. *Brinkman I, supra,* is manifest. Detailed findings of fact are wholly lacking to justify the reallocation of petitioners' resources on the scale undertaken by the district court and affirmed on appeal. Far from exhibiting "an unusual character," cf. *Milliken* v. *Bradley II, supra,* 433 U.S. 296 (POWELL, J., concurring), cases such as this are becoming the norm. This

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(1978). However, it is clear that the district court decision at issue here did not rely on or attempt to link the funding ordered to petitioners' proven liability, any more than it was found to be directly related to any other condition caused by a constitutional violation. It would seem that, on the present record, the appropriation decision of petitioners should be entitled to a presumption of constitutionality. Cf. *Evans* v. *Buchanan, supra.*

Court can no longer ignore the tendency of district courts to engage in broad "social experiments," cf. *Liddell* v. *Board of Education, supra,* 567 F.Supp. at 1041, under the guise of implementing desegregation remedies. Here, as in *Liddell,* the district court's findings simply do not justify the remedy imposed. *Dayton, supra,* 433 U.S. at 414. Further, the district court clearly failed to take into account "changed circumstances" of both petitioners and the Buffalo public school system, when it decided to reallocate over seven million dollars in petitioners' budget. This approach seemingly conflicts with the rules enunciated in *Pasadena City Bd. of Education* v. *Spangler,* 427 U.S. 424 (1976) regarding administration of remedial decrees. It is apparent that changes in availability of revenue must be taken into account by district courts in superintending desegregation of schools.

The decision of the court of appeals in this case also directly conflicts with the decision of the Court of Appeals for the Third Circuit in *Evans* v. *Buchanan, supra,* the decision of the Sixth Circuit in *Oliver* v. *Kalamazoo Bd. of Ed., supra,* and the decision of the Eighth Circuit in *United States* v. *Board of Education of City of Chicago,* ____F.2d____ (Sept. 9, 1983).

The court of appeals in the instant case wholly ignored the duty of the Buffalo Board of Education to give priority in its budgeting to the demands of school desegregation decrees, as required by *Evans.* Instead, the court of appeals appears to have approved the concept that school authorities are entitled always to seek fresh funds to implement desegregation decrees, and need not demonstrate that existing resources are inadequate before securing funds through judicial decree. The court of appeals also ignored the elementary principle, followed by the Sixth Circuit in *Oliver,* that "cognitive and behavioral ancillary programs" are appropriate only if shown to be constitutionally necessary, with the burden of proof falling on the remedy's proponents. Finally, the court of appeals here simply gave no thought to considerations of comity, unlike the Seventh Circuit

in *United States* v. *Bd. of Education of City of Chicago, supra.* On the contrary, the court of appeals authorized the district court to disregard budget decisions made by petitioners, and to rely almost entirely on the ipse dixit of the Board of Education and on the status of petitioners as "defendants," though without reference to the scope of their liability, if any. Clearly, there is more to comity than automatic deference to the local educational authorities.

Because the decisions of the district court and the court of appeals in this case depart from even the general standards laid down in *Milliken II* and *Dayton I, supra,* and conflict with the decisions by the Third, Sixth and Seventh Circuits in matters relating to funding disputes and federal remedial decrees, it is desirable that this Court grant certiorari to review and correct the judgment of the court of appeals herein.

CONCLUSION

Although this Court has repeatedly emphasized the inherent limitations on the equitable powers of the federal courts, and has repeatedly demanded that remedies be tailored to the scope of constitutional wrongs, it is plain that these standards have not sufficed to confine the federal district courts to the proper sphere of judicial activity. In particular, the "unusual" case of *Milliken* v. *Bradley II, supra,* has spawned numerous school desegregation cases in which the federal courts are asked continually to intrude into the fiscal operations of state and local governments on a massive scale, to finance "quality education" programs. More often than not, these programs have little if anything to do with a demonstrable inequality between racial groups attributable to identifiable constitutional violations. Instead, they are elements of broad social experiments or, more frequently, bureaucratic maneuvering to manipulate the federal judicial process in aid of local struggles over scarce public funds. The time has come for this Court to intervene and limit federal exercise of the power of the purse to those cases where

such action is clearly needed to remedy an identifiable unconstitutional condition, or a demonstrable effect of a constitutional violation. Precise standards concerning burden and quantum of proof will do much to moderate the sort of disruption of the federal system evinced by this case. Accordingly, certiorari should be granted, and the judgment of the court of appeals should be reversed.

Respectfully submitted,

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